APPENDIX A

OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT.

House, J. The facts in this case are not in dispute. In 1965 the defendant, the highway commissioner, acting pursuant to No. 309 of the 1965 Public Acts, February Special Session (now General Statutes [Rev. to 1966] § 13a-73 (b)), acquired the land of the plaintiffs for highway purposes and assessed as damages to the plaintiffs the sum of $83,600. The owners appealed from the assessment of damages, claiming that they were inadequate, and the appeal was referred to a state referee, whose finding has not been attacked.

The referee reported that the property taken consisted of an area of 15,000 square feet on which there was a one-story, masonry and frame building in which the plaintiffs conducted a retail supermarket. The value of the business at the time of the taking was $42,500, and the moving costs, if the business could be moved to another location in the area, would amount to $10,171. There is no location or site anywhere in the area which the plaintiffs could acquire and on which they could erect a building into which they could move their business, including fixtures and equipment. The value of moveable fixtures which the plaintiffs will lose by not being able to move their business amounts to $16,364. The referee found that, taking into account the moving costs of $10,171, the damages sustained by the plaintiffs by reason of the taking were $139,000. In the alternative, he found that, if, as a

matter of law, the plaintiffs were entitled to compensation for the value of the business and fixtures as he had found their separate values to be, the damages sustained by the plaintiffs amounted to $188,000. The defendant moved to accept the report in accordance with the finding assessing damages at $139,000, and the plaintiffs moved that it be accepted in accordance with the alternative finding assessing the damages at $188,000. The court accepted the report and rendered judgment for the plaintiffs on the alternative assessment of damages at $188,000. From this judgment the defendant has appealed.

By including in the award a separate allowance for the value of the business conducted on the premises taken, where the condemning authority did not take the business as it did in such cases as **Kimball Laundry Co. v. United States,** 338 U.S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765, the court departed from the established rule for the assessment of damages in eminent domain proceedings.

As we said in **Housing Authority v. Lustig,** 139 Conn. 73, 75, 90 A.2d 169: "It is the general rule that when real property is the only subject of condemnation nothing should be included in the damages for the loss of a business conducted upon the property unless the statute specifically authorizes it. . . . [p. 76] In a case such as the present, where an entire piece of property is taken, the proper measure of damages is the fair market value of the real property. We said in **Andrews v. Cox,** 127 Conn. 455, 457, 17 A.2d 507: 'Generally speaking, market value is "the price that would in all probability—the prob-

ability being based upon the evidence in the case—result from fair negotiations, where the seller is willing to sell and the buyer desires to buy." **Portland Silk Co. v. Middletown,** 125 Conn. 172, 174, 4 Atl. (2d) 422. From this it follows that in determining market values in awarding damages for land taken, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land; . . . unless, indeed, the considerations advanced are not a necessary, natural or proximate result of the taking . . . The determination of the damages to be paid requires the consideration of "everything by which the value is legitimately affected"; **Holley v. Torrington,** 63 Conn. 426, 433, 28 Atl. 613; . . .' The fair market value of a piece of real property should be determined in the light of the use to which it is being put or the use to which it could be put most advantageously. **New York, N. H. & H. R. Co. v. New Haven,** 81 Conn. 581, 585, 71 A. 780; **Campbell v. New Haven,** 101 Conn. 173 180, 125 A. 650. Accordingly, the better reasoned cases hold that, although the value of a business which is being conducted upon the real property condemned may not ordinarily be added to the market value of the realty as damages for the taking, the fact that a given business is in operation on the property should be taken into consideration in determining the market value of the real property if in truth it is a factor in establishing that market value—if, that is, the use of the real property for that purpose enhances the value of it. **Edmands v. Boston,** 108 Mass. 535, 549; **King v. Minneapolis Union Ry. Co.,** 32 Minn. 224, 226, 20 N.W. 135; **Pittsburgh, V. & C. Ry Co. v. Vance,** 115 Pa. 325, 334, 8 A. 764; **Chairman of Highway Com-**

mission v. Parker, 147 Va. 25, 29, 136 S.E. 496; **Voigt v. Milwaukee County,** 158 Wis. 666, 670, 149 N.W. 392. In particular, it is proper to take into consideration the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put. **State v. Carrow,** 57 Ariz. 429, 433, 114 P.2d 891; **Philbrook v. Berlin-Shelburne Power Co.,** 75 N.H. 599, 74 A. 873; **Hunter's Administrator v. Chesapeake & O. Ry. Co.,** 107 Va. 158, 165, 59 S.E. 415."

This is the rule of damages which we have consistently followed. See **Stanley Works v. New Britain Redevelopment Agency,** 155 Conn. 86, 102, 230 A.2d 9; **DelVecchio v. New Haven Redevelopment Agency,** 147 Conn. 362, 363, 161 A.2d 190; **Humphrey v. Argraves,** 145 Conn. 350, 353, 143 A.2d 432; **Harvey Textile Co. v. Hill,** 135 Conn. 686, 689, 67 A.2d 851. It is in accord with the view of most authorities that injury to or even the destruction of a business conducted on land taken by eminent domain is not to be considered a separate element of damage in the condemnation proceeding although the special value of land owing to its adaptability for use in a particular business is an element which the owner of land is entitled to have considered in the determination of the amount to be paid as just compensation for the taking of the land. In addition to the cases cited above, see, **United States v. General Motors Corporation,** 323 U.S. 373, 383, 65 S. Ct. 357, 89 L. Ed. 311; **Mitchell v. United States,** 267 U.S. 341, 344, 45 S. Ct. 293, 69 L. Ed. 644; **Joslin Co. v. Providence,** 262 U.S. 668, 675, 43 S. Ct. 684, 67 L. Ed. 1167; 1 Orgel, Valuation under Eminent Domain (2d Ed.) §§ 75, 78; 4 Nichols, Eminent

Domain (3d Ed.) § 13.3; 27 Am. Jur. 2d, Eminent Domain, § 285; comment, "Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses," 67 Yale L.J. 61, 74.

There is nothing in this case which requires a change in our established rule. This is so even if the plaintiffs were correct in their claim that the referee's finding that "[t]here is no location or site anywhere in the area which the plaintiffs could acquire and upon which they could erect a building to which they could move their business" is the equivalent of a finding that the plaintiffs could not move their retail business to any other location whatsoever.

There is error, the judgment is set aside and the case is remanded with direction to render judgment that the damages to which the plaintiffs are entitled are $139,000, not $188,000.

In this opinion the other judges concurred.

APPENDIX B

OPINION OF THE SUPERIOR COURT FOR FAIRFIELD COUNTY.

In this action, the plaintiffs have appealed from the assessment of damages for land taking by the highway commissioner. The matter was referred to a referee. The referee found that (1) the plaintiffs conducted a retail supermarket on the site taken; (2) there is no location or site anywhere in the area which the plaintiffs could acquire and upon which they could erect a building to which they could move their business, including fixtures and equipment; (3) the value of the business at the time of taking is $42,500. and; (4) the value of moveable fixtures which the plaintiffs would lose by not being able to move their business amounts to $16,364. It is the contention of the plaintiffs that they are entitled to compensation for the value of the business and fixtures, in addition to compensation for the land and improvements thereon by the defendant, in which event, the alternative damages found by the referee (paragraph 8 of his report) would be $188,000. It is the contention of the defendant that the plaintiffs are not entitled to the value of the business and fixtures, in which event, the alternative damages found by the referee (paragraph 7 of his report) would be $139,000.

Article First, Section 11 of the Constitution of Connecticut provides "The property of no person shall be taken for public use, without just compensation therefor." A similar provision is contained in the Fifth Amendment of the Constitution of the

United States of America. The Fifth and Fourteenth Amendments of the federal constitution also provides that no person shall be deprived of property without due process of law. What is the just compensation due the plaintiffs? "The question of what is just compensation is an equitable one rather than a strict legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken." **Colaluca v. Ives,** 150 Conn. 521, 530; **Winchester v. Cox,** 129 Conn. 106, 114. In the present matter, the referee found that there was no location or site anywhere in the area to which the plaintiffs could move their business. A business which cannot relocate, cannot survive and must, of necessity, go out of existence. When the land and building thereon were taken by the defendant, the life of the business, as a real and practical matter, was also taken. The same can be said of the moveable fixtures. "Damages are measured by the loss to the owner, not by the gain to the taker." **Robert v. New York City,** 295 U.S. 264, 282; **United States ex rel T.V.A. v. Powelson,** 219 U.S. 266, 281. The plaintiffs have suffered the loss of their business and fixtures by the taking of the defendant. Destruction is tantamount to taking. They are entitled to just compensation. It would be inequitable and an unsatisfactory result, if the value of a going business and moveable fixtures can be totally destroyed without any compensation because in a narrow sense of that word, they had not been taken for public use.

Section 13a-73(b) of the General Statutes provides "The commissioner may take any land he finds

necessary for the layout . . . of any state highway and the owner of such land shall be paid by the State for all damages." This statute, which implements the constitution provisions as applied to takings by the highway commissioner, is very broad. It provides for the payment of "all damages." The word "all" means "the whole of." Webster's New International Dictionary, Second Edition. Giving this statute its broadest, liberal interpretation and construction in favor of the plaintiffs, whose property is vitally affected, the highway commission may take land and the State pay for "all damages" proximately and directly the result of the taking of the land. The taking of the land forced and caused the plaintiffs to attempt to relocate their business, which the referee found they could not do. The direct result of the taking being damages (loss of business and moveable fixtures) to the plaintiffs.

The highway commissioner took the land of the plaintiffs. Since the statute provides for the recovery of "all damages," the determination of the damages to be paid required the consideration of everything by which the value was legitimately affected. **Altman v. Hill,** 144 Conn. 233; **Harvey Textile v. Hill,** 135 Conn. 686. Market value is a measure of damages to be considered. "Generally speaking, the market value is the price that would in all probability — the probability being based upon the evidence in the case — result from negotiations, where the seller is willing to sell and the buyer desires to buy." **Portland Silk Co. v. Middletown,** 125 Conn. 172, 174; **Andrew v. Cox,** 127 Conn. 455, 457. "From this it follows that in determining market values in awarding damages for land taken, it is proper to consider all those ele-

ments which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land; . . . unless, indeed the considerations advanced are not a necessary, natural or proximate result of the taking." The fair market value of a piece of real property should be determined in the light of the use to which it is being put or the use to which it could be put advantageously." **Housing Authority v. Lustig,** 139 Conn. 73, 76. In view of the finding of the referee that there is no location or site anywhere in the area which the plaintiffs can move their business, including fixtures and equipment, the plaintiffs would be extremely reluctant to sell unless the selling price of the land included an amount for the business and an amount for the moveable fixtures which they would lose by not being able to move their business. The moving of the business and fixtures would be a necessary result of the taking. This would be a controlling factor in determining the market value of the land, with the improvements thereon. Reason would dictate that without these items included in the gross sales price, the plaintiffs would be no willing seller. The referee did more than merely consider these items and add them to the market value of the land. He found them to be a fact and gave them a fair value as separate items. It is illogical to say that he can consider them but cannot find a fair value for each of them. Both roads lead to the same result.

Again, market value is not always the true test. The market value might fall short of the just compensation where the situation is of a unique nature and the business cannot be located elsewhere. **Suffield v. Thompsonville Bridge Co.,** 82 Conn. 460. Just

compensation means a fair equivalent in money for the property taken from the condemnee as nearly as its nature will permit. In the present matter, the referee found the amount of the alternative damages in paragraph 8 of his report to be $188,000.

Accordingly, for the foregoing reasons, the report of the referee is accepted and judgment be entered thereon in accordance with the findings set forth in paragraph 8 thereof, assessing damages to the plaintiffs at $188,000.

A. J. ARMENTANO. Judge.

Filed Dec. 8, 1965. (sic)

APPENDIX C

MOTION TO REARGUE.

The appellees in the above-entitled action, respectfully move this court for permission to reargue, limited to the question presented in the record as to whether or not Section 13a-73b of the General Statutes, as applied, violates the Fifth and Fourteenth Amendments to the United States Constitution.

In awarding damages to the appellees, the trial court relied upon the Fifth and Fourteenth Amendments to the United States Constitution. The appellees claimed in their brief to this court that the Fifth Amendment to the United States Constitution required that they be compensated for all of the loss occasioned by the Highway Commissioner's taking of their property. The validity of Section 13a-73b as applied in prior decisions of this court was drawn into question. The appellees respectfully represent that implicit in the decision of the court in the instant case is the construction of Section 13a-73b of the General Statutes which is contrary to that which the trial court and the appellees have asserted is required by the Fifth and Fourteenth Amendments to the United States Constitution.

Since the decision of this court announced December 5, 1967, did not discuss the effect of the United States Constitution upon Section 13a-73b of the General Statutes nor indicate that this aspect of the appellees' argument had been considered, the appellees respectfully request an opportunity to reargue before this court in order that the decision in the

above-entitled action might be reconsidered in light of the mandates of the Fifth and Fourteenth Amendments to the United States Constitution.

The Appellees,

By COLES, O'CONNELL
& DOLAN,
Their Attorneys.

APPENDIX D

DENIAL OF MOTION TO REARGUE.

"December 19, 1967.

The motion by the plaintiffs for reargument is denied.

By the Court,
ALCORN,
Acting Chief Justice"

APPENDIX E

JUDGMENT OF SUPERIOR COURT FOR FAIRFIELD COUNTY.

This appeal by the plaintiff, dated August 24, 1965, from the appraisal of damages by the defendant, for the taking of certain land owned by the plaintiff, situated in the City of Bridgeport, County of Fairfield, State of Connecticut, on the Southwesterly side of Lafayette Street and bounded:

Northeasterly:	by Lafayette Street, 105 feet, more or less;
Southeasterly:	by land now or formerly of Frank L. Pinto, Jr., 145 feet;
Southwesterly:	by lands now or formerly of Wheeler Enterprises Incorporated and Frate Incorporated (each in part) 105 feet;
Northwesterly:	by land now or formerly of Stanislaw Jaworowski, et al, 143 feet 6 inches;

Together with all buildings and appurtenances, being the same premises as contained in two (2) certain instruments namely, a Quit Claim Deed dated November 8, 1955 and a Quit Claim Deed dated Ocober 3, 1962, and recorded in Volume 1102, Page 562 and Volume 1249, Page 17 respectively, of the Town of Bridgeport Land Records.

for the taking of which said defendant appraised the damages due the plaintiffs to be $83,600.00 and praying that the damages be reappraised, came to this

Court on the First Tuesday of Sept., 1965, the defendant having deposited on 8/20/65 with said Clerk the sum of $83,600.00 to the use of the persons entitled thereto, and said action came thence to Sept. 24, 1965, when, notice of the pendency of said appeal having been given to said defendant, the Court referred said appeal to the Hon. Samuel Mellitz, a State Referee, to make a reassessment of damages and report to this Court, and thence to August 30, 1965, when said Referee filed his report (finding damages in the alternative of $139,000.00 or $188,000.00), and thence to September 30, 1966 when the parties appeared and were heard by the Court on the plaintiffs' motion for the acceptance of said report and for the entry of judgment in accordance with the same.

The Court, having heard the parties on said motion and report, accepted the report of said Referee (Second Alternative) on December 8, 1966, found that the amount due to the plaintiffs as damages for the taking of said land was $188,000.00, that the sum of $83,600.00 had been deposited by the defendant for the use of persons entitled thereto on account of the just compensation to be awarded, that the amount of the deficiency between the compensation finally awarded and the amount of money so deposited was $104,400.00, that the sum of $8,143.20 was due the plaintiffs as interest, and that the sum of $2,300.00, was a reasonable amount to award the plaintiffs as appraisal fees.

Thence the defendant appealed from this judgment on December 19, 1966 to the Supreme Court of the State of Connecticut, January Term, 1967, and

thence to November 7, 1967 when the parties appeared and were heard by the Supreme Court.

The Supreme Court having heard the parties, entered a decision on November 21, 1967, announced it on December 5, 1967, in which the foregoing judgment was set aside and the case remanded with direction to render judgment that the damages to which the plaintiffs are entitled are $139,000, not $188,000.

Thence the plaintiffs filed on December 11, 1967, a Motion to Reargue which was denied by the Supreme Court on December 19, 1967, and thence to January 19, 1968 when the motion of the defendant for judgment in accordance with the opinion of the Supreme Court was granted by this court.

Whereupon it is adjudged that the deficiency and interest due to the plaintiffs for taking of said land is $59,721.20 together with costs taxed at $2,498.38 which costs include appraisal fees in the amount of $2,300.00.

By The Court

Clerk.

January 19, 1968.

APPENDIX F

SECTION 13a-73b, CONNECTICUT GENERAL STATUTES.

(b) **CONDEMNATION.** The commissioner may take any land he finds necessary for the layout, alteration, extension, widening, change of grade or improvement of any state highway and the owner of such land shall be paid by the state for all damages and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The assessment of such damages and of such benefits shall be made by the commissioner and filed by him with the clerk of the superior court in the county in which the land affected is located, and such clerk shall give notice of such assessment to each owner of land affected thereby by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by said commissioner, the physical construction of such layout, alteration, extension, widening, change of grade or other improvement may be made.

APPENDIX G

SECTION 13a-76, CONNECTICUT GENERAL STATUTES.

Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may, at any time within six months after the same has been so filed, apply to the superior court for the county within which such land is situated or, if said court is not in session, to any judge thereof for a reassessment of such damages or such benefits so far as the same affect such applicant, and said court or such judge, after causing notice of the pendency of such application to be given to said commissioner, shall appoint a state referee to make such reassessment of such damages or such benefits. Such referee, having given at least ten days' notice to the parties interested of the time and place of hearing, shall hear the applicant and said commissioner, shall view the land and take such testimony as such referee deems material and shall thereupon reassess such damages and benefits so far as they affect such applicant and forthwith report to the court. If the amount of the reassessment of such damages awarded to any such property owner exceeds the amount of the assessment of such damages by the commissioner for such land, said court or such judge shall award to such property owner such appraisal fees as said court or such judge determines to be reasonable. Such report may be rejected for any irregular or improper conduct in the performance of the duties of such referee. If the report is rejected, the court or judge shall appoint another referee, and such referee shall proceed in the

manner in which the referee first appointed should have proceeded. If the report is accepted, such assessment shall be conclusive upon such owner and the state. If no appeal to the supreme court of errors is filed within the time allowed by law, or if one is filed and the proceedings have terminated in a final judgment finding the amount due the landowner, the clerk shall send a certified copy of the assessment of the commissioner and of the judgment to the comptroller, who shall, upon receipt thereof, draw his order upon the treasurer in favor of the landowner for the amount due him as damages. The pendency of any such application for reassessment shall not prevent or delay the layout, extension, alteration, widening, change of grade or other improvement of any such highway.

APPENDIX H

PERTINENT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.